

IN THE SUPREME COURT OF TEXAS

=====
No. 00-0140
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IN RE JANE DOE

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ON PETITION FOR REVIEW
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JUSTICE OWEN, joined by CHIEF JUSTICE PHILLIPS as to Parts I and III, concurring.

I join in the Court’s judgment reversing the court of appeals and remanding this matter to the trial court for further proceedings, but I cannot join the opinion of the Court in parts IV-VII. The Court refuses to give full effect to the statutory mandate that before a minor can obtain authorization to proceed with an abortion without notifying one of her parents, she must be “mature and sufficiently well informed to make the decision.” TEX. FAM. CODE § 33.003(i). The Court’s interpretation of “sufficiently well informed” falls short of what the Legislature had in mind. Most minors will, with the assistance of counsel, be able to meet the requirements set by the Court, which are minimal. The plain language of the Family Code and its historical backdrop require a more substantive showing.

I

The history of how and why the bypass procedure in section 33.003 of the Family Code came to be sheds light on how it should be construed. Over twenty years ago, the United States Supreme Court handed down two landmark decisions dealing with minors and abortion. *See Planned*

Parenthood of Central Mo. v. Danforth, 428 U.S. 52 (1976); *Bellotti v. Baird*, 428 U.S. 132 (1976) (*Bellotti I*) (issued the same day as *Danforth*). In *Danforth*, the Supreme Court held for the first time that a parent does not have an absolute “veto” over the decision of a minor to terminate her pregnancy:

[T]he State may not impose a blanket provision . . . requiring the consent of a parent . . . as a condition for abortion of an unmarried minor [T]he State does not have the constitutional authority to give a third party an absolute, and possibly arbitrary, veto over the decision of the physician and his patient to terminate the patient’s pregnancy, regardless of the reason for withholding consent.

Danforth, 428 U.S. at 74. The Court further concluded that “[a]ny independent interest the parent may have in the termination of the minor daughter’s pregnancy is no more weighty than the right of privacy of the competent minor mature enough to have become pregnant.” *Id.* at 75.

In so holding, the Supreme Court said that it did not mean to suggest that “every minor, regardless of age or maturity, may give effective consent for termination of her pregnancy.” *Id.* at 75. Consistent with that statement, the Court registered its concern that there are “unquestionably greater risks of inability to give an informed consent” for a minor. *See Bellotti I*, 428 U.S. at 147. The Court suggested that a statute requiring parental consent before a minor could obtain an abortion might be constitutional if there were also a provision that allowed the minor to go to court to obtain consent. *Id.*

In *Bellotti II*, a plurality of the Supreme Court adopted what the Court had previously suggested in *Bellotti I* by holding that parental consent statutes would not pass constitutional muster unless the State provided an alternative procedure in which a minor could receive authorization for an abortion. *See Bellotti v. Baird*, 443 U.S. 622, 646-47 (1979) (plurality opinion) (*Bellotti II*). The

Bellotti II plurality concluded that a minor must be permitted an opportunity to show “either: (1) that she is mature enough and well enough informed to make her abortion decision, in consultation with her physician, independently of her parents’ wishes; or (2) that even if she is not able to make this decision independently, the desired abortion would be in her best interests.” *Id.* at 643-44. With regard to the determination of maturity, *Bellotti II* stated that “the peculiar nature of the abortion decision requires the opportunity for case-by-case evaluations of the maturity of pregnant minors.” *Id.* at 643 n.23. The *Bellotti II* plurality also concluded that a parental bypass proceeding must maintain the anonymity of the minor and must be completed with “sufficient expedition to provide an effective opportunity for an abortion to be obtained.” *Id.* at 644.

A majority of the United States Supreme Court has subsequently approved the *Bellotti II* parental bypass requirements. *See City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 439-42 (1983) (*Akron I*) (holding parental consent statute unconstitutional in light of *Bellotti II*); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502, 510-13 (1990) (*Akron II*) (declining to decide whether parental bypass was constitutionally required in a notification rather than a consent statute, but applying *Bellotti II* requirements).

A question specifically left open in United States Supreme Court decisions is whether the parental bypass procedure set forth above is constitutionally mandated when a statute requires only that a parent be notified that the minor is about to undergo an abortion as opposed to a statute that requires parental consent. *See, e.g., Lambert v. Wicklund*, 520 U.S. 292, 295 (1997) (per curiam); *Akron II*, 497 U.S. at 510. Nevertheless, there is reasoning in *Bellotti II* that would suggest that the United States Supreme Court might hold that bypass procedures are necessary in notification

statutes. The statute under consideration in *Bellotti II* required that a parent be notified when a minor brought judicial proceedings to obtain consent. *See* 443 U.S. at 646. The Supreme Court struck down this provision, observing ““there are parents who would obstruct, and perhaps altogether prevent, the minor’s right to go to court.”” *Id.* at 647 (quoting the district court). The Court continued, stating that every minor must have the opportunity to go to court without first notifying a parent:

[M]any parents hold strong views on the subject of abortion, and young pregnant minors, especially those living at home, are particularly vulnerable to their parents’ efforts to obstruct both an abortion and their access to court. It would be unrealistic, therefore, to assume that the mere existence of a legal right to seek relief in superior court provides an effective avenue of relief for some of those who need it the most.

* * *

[E]very minor must have the opportunity—if she so desires—to go directly to a court without first consulting or notifying her parents. If she satisfies the court that she is mature and well enough informed to make intelligently the abortion decision on her own, the court must authorize her to act without parental consultation or consent.

Id. (plurality opinion) (emphasis added).

Undoubtedly cognizant of these holdings and admonitions of the United States Supreme Court, the Texas Legislature enacted amendments to the Family Code that require parental notification before a minor may obtain an abortion, but the Legislature also included a bypass provision. *See* TEX. FAM. CODE §§ 33.002, 33.003. The bypass procedures substantially track those set forth in *Bellotti II*. *See id.* § 33.003. A minor may apply to a court for an order authorizing her to consent to an abortion without notification of a parent or guardian. *See id.* The trial court may not authorize a minor to consent to an abortion unless it determines by a preponderance of the evidence

whether the minor is mature and sufficiently well informed to make the decision to have an abortion performed without notification to either of her parents or a managing conservator or guardian, whether notification would not be in the best interest of the minor, or whether notification may lead to physical, sexual, or emotional abuse of the minor.

Id. § 33.003(i).

II

The bypass procedure in section 33.003 does not mean, however, that the Legislature intended for a minor to proceed with an abortion based on a minimal showing. The Legislature has required that the minor be mature and sufficiently well informed to make the decision. In determining what the Legislature meant by those terms, it again must be borne in mind that decisions of the United States Supreme Court have dominated abortion law. There is a substantial body of law from that Court regarding what a state may and may not require to demonstrate a woman's informed consent to an abortion. That law should guide interpretation of section 33.003.

Given the context in which section 33.003 of the Family Code was enacted, I can only conclude that the Legislature intended to require minors to be informed about the decision to have an abortion to the full extent that the law, as interpreted by the United States Supreme Court, will allow. Accordingly, I turn to what the United States Supreme Court has said regarding informed consent and what states may require.

III

The United States Supreme Court has made it clear that when a woman is making a decision about abortion, particularly when she is a minor, a state can require consideration of factors in addition to the physical risks of the procedure. Those include recognition that there are profound

philosophic arguments surrounding abortion, consideration of the impact that the procedure will have on the fetus, an understanding that there may be an emotional and psychological impact following an abortion and later in life, and consideration of how the decision to obtain an abortion may impact present and future familial relationships.

With regard to the philosophic aspects of the abortion decision, a majority of the Court observed in *Akron II* that:

A free and enlightened society may decide that each of its members should attain a clearer, more tolerant understanding of the profound philosophic choices confronted by a woman who is considering whether to seek an abortion. Her decision will embrace her own destiny and personal dignity, and the origins of the other human life that lie within the embryo.

Akron II, 497 U.S. at 520.

Other members of the Supreme Court again acknowledged the philosophic and social aspects of the abortion decision in *Planned Parenthood v. Casey*, 505 U.S. 833, 872 (1992) (plurality opinion). They further acknowledged that when an adult woman is considering whether to have an abortion, a state may take steps to ensure that the decision is thoughtful and informed:

Though the woman has a right to choose to terminate or continue her pregnancy before viability, it does not at all follow that the State is prohibited from taking steps to ensure that this choice is thoughtful and informed. Even in the earliest stages of pregnancy, *the State may enact rules and regulations designed to encourage her to know that there are philosophic and social arguments of great weight that can be brought to bear in favor of continuing the pregnancy to full term* and that there are procedures and institutions to allow adoption of unwanted children as well as a certain degree of state assistance if the mother chooses to raise the child herself. "[T]he Constitution does not forbid a State or city, pursuant to democratic processes, from expressing a preference for normal childbirth." It follows that *States are free to enact laws to provide a reasonable framework for a woman to make a decision that has such profound and lasting meaning*. This, too, we find consistent with *Roe's*

central premises, and indeed the inevitable consequence of our holding that the State has an interest in protecting the life of the unborn.

Id. at 872-73 (citation omitted) (emphasis added).

In *Casey*, the Chief Justice, joined by three other Justices, agreed with the plurality that the informed consent provisions at issue did not unduly burden the abortion decision. *See id.* at 969 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). In the Chief Justice's separate opinion, the concurring Justices observed that a state "has an interest in preserving unborn life," and that it may take steps to ensure "that a woman's decision to abort is a well-considered one, and reasonably furthers the State's legitimate interest in maternal health and in the unborn life of the fetus." *Id.* The Chief Justice's opinion further concluded that a 24-hour waiting period designed to give a woman time to reflect on her decision "is surely a small cost to impose to ensure that the woman's decision is well considered in light of its certain and irreparable consequences on fetal life, and the possible effects on her own." *Id.* at 969-70 (quoting *Akron I*, 462 U.S. at 474 (O'Connor, J., dissenting)).

Initially, the Supreme Court had struck down as unconstitutional statutes that were fairly specific in their requirements for informed consent to an abortion. *See Thornburgh v. American College of Obstetricians and Gynecologists*, 476 U.S. 747, 759-65 (1986); *Akron I*, 462 U.S. at 442-45. However, in *Casey*, a majority of the Justices overruled *Thornburgh* and *Akron I*, at least in part. *See Casey*, 505 U.S. at 881-87 (plurality opinion); *id.* at 966-69 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Although the constitutional limits on what a state may require for informed consent are not entirely clear after the Supreme Court's decision in *Casey*, it

is clear that a state may require a “thoughtful and informed” decision that encourages a woman to consider that there are “philosophic and social arguments of great weight that can be brought to bear.” *Casey*, 505 U.S. at 872 (plurality opinion); *see also Akron II*, 497 U.S. at 520. With regard to the emotional and psychological consequences of an abortion for a minor, a majority of the Supreme Court in *Akron II* said: ““The medical, emotional, and psychological consequences of an abortion are serious and can be lasting; this is particularly so when the patient is immature.”” *Akron II*, 497 U.S. at 519 (quoting *H.L. v. Matheson*, 450 U.S. 398, 411 (1981)).

IV

Today, this Court refuses to acknowledge the foregoing body of law or the likelihood that our Legislature relied on it when it said that a minor must be “sufficiently well informed to make the decision to have an abortion.” The Court chooses to ignore that the Legislature intended section 33.003 to encompass factors other than physical risk to the pregnant minor and alternatives to abortion. The Legislature did not intend for the “mature and sufficiently well informed requirement” of section 33.003 to have as limited a focus as the Court ascribes to it. I would hold that a minor must demonstrate more.

The Court properly requires a minor to consult a health-care provider about the general risks of an abortion. But that is insufficient. There may be risks that are heightened for or unique to an individual. A minor cannot make a sufficiently well-informed decision about an abortion if she does not know the risks to *her* of that procedure. In this regard, the Family Code expressly allows a pregnant, unmarried minor to consent to medical treatment by a physician, short of an abortion itself. *See* TEX. FAM. CODE § 32.003(a)(4).

The Court recognizes that just as there are physical risks associated with an abortion, there are emotional and psychological consequences, which can be significant for some women. But the Court's treatment of this aspect of the abortion decision—one of *the* most important considerations—is superficial. I would require a minor to demonstrate that she has sought and obtained meaningful counseling from a qualified source about the emotional and psychological impact she may experience now and later in her life as a result of having an abortion. She should be able to demonstrate to a court that she understands that some women have experienced severe remorse and regret. She should also indicate to the court that she is aware of and has considered that there are philosophic, social, moral, and religious arguments that can be brought to bear when considering abortion. *See generally Casey*, 505 U.S. at 872 (plurality opinion). A court cannot, of course, require a minor to adopt or adhere to any particular philosophy or to profess any religious beliefs. But requiring a minor to exhibit an awareness that there are issues, including religious ones, surrounding the abortion decision is not prohibited by the Establishment Clause. *Cf. Lemon v. Kurtzman*, 403 U.S. 602, 612-13 (1971) (holding that a statute must have a secular legislative purpose, that its principal or primary effect must be one that neither advances nor inhibits religion, and that it must not foster an excessive government entanglement with religion). The State's statutorily expressed interest in section 33.003 is to ensure a well-informed decision, which includes a mature understanding of all issues surrounding the decision to have an abortion.

An informed appreciation of the emotional and psychological aspects of terminating a pregnancy includes an understanding of the impact the procedure will have on the fetus. As Justices

O'Connor, Kennedy, and Souter observed in *Casey*, failure to obtain a full understanding of this aspect of the procedure can lead to “devastating psychological consequences” afterwards:

Nor can it be doubted that most women considering a abortion would deem the impact on the fetus relevant, if not dispositive, to the decision. In attempting to ensure that a woman apprehend the full consequences of her decision, the State furthers the legitimate purpose of reducing the risk that a woman may elect an abortion, only to discover later, with devastating psychological consequences, that her decision was not fully informed.

Casey, 505 U.S. at 882.

In this same vein, these Justices explained, “[I]n order for there to be informed consent to a kidney transplant operation the recipient must be supplied with information about risks to the donor as well as risks to himself or herself.” *Id.* at 883. No less should be required for an abortion.

The Court today gives a nod to the fact that a decision to have an abortion may impact relationships with family members. I would require a minor to demonstrate that she has thoughtfully considered the potential impact on her relationships with her parents and other family members if they learn now or sometime in the future that she has had an abortion. She should also exhibit some consideration of how this decision may impact her future relationships, such as those she may have with a husband or future children. A minor should also have considered the impact that continuing her pregnancy would or might have on these relationships.

While a minor must demonstrate a knowledge and appreciation of the various considerations involved in her decision, I agree with the Court that she should not be required to obtain counseling or other services from a particular provider. The internet should not, however, suffice. Nor should advice from laypersons who are not specifically trained and experienced in counseling pregnant

minors suffice. The “State’s interest is in ensuring that the woman’s consent is informed and unpressured; the critical factor is whether she obtains the necessary information and counseling from a qualified person, not the identity of the person from whom she obtains it.” *Akron II*, 497 U.S. at 518. I note, however, that a majority of the Supreme Court has observed that “[i]t seems unlikely that [a minor] will obtain adequate counsel and support from the attending physician at an abortion clinic, where abortions for pregnant minors frequently take place.” *H.L. v. Matheson*, 450 U.S. 398, 410 (1980) (quoting *Planned Parenthood v. Danforth*, 428 U.S. 52, 91 (1976) (concurring opinion)). By the same token, it seems unlikely that a minor would obtain all the information necessary for a well-informed decision about proceeding with an abortion, such as medical information, solely from a religious organization or an advocacy group.

V

I agree with the Court that Jane Doe has not established as a matter of law that she is sufficiently well informed to make the decision to have an abortion performed without notification of one of her parents. With regard to the emotional and psychological consequences of an abortion, Jane Doe testified that she understood that there “is some emotional factor that can distress you and there is a slight risk of infection, not much.” When asked if she anticipated seeking additional counseling if she were authorized by the Court to consent to an abortion, she said, “I haven’t thought about it, but I think I do not need further counseling. I feel that my decision, and [sic] once it is followed through, would be fine. I am aware of it.” She also testified that she had talked with an adult relative who had an abortion as a minor. That relative told Jane Doe that she has not regretted her decision. Jane Doe had also talked to two of her friends who had become pregnant as minors

and were raising their respective children. One was of college age and told Jane Doe that “she really wishes that she hasn’t [sic] had her child.” This friend is currently unable to attend college or to support herself and her child, and she intends to move back in with her parents. Jane Doe’s other friend is fifteen and has married the father of her child. Jane Doe perceives that they are having “a very hard life,” and her friend told her that “they wish they could take it back.” Jane Doe also talked to a friend who has had an abortion. That friend told her that her own decision to have an abortion was “a good thing” and that she does not regret it.

The fact that Jane Doe has sought advice from friends and family indicates that she is seeking information as a mature person would do. Minors in Jane Doe’s position should not be discouraged from asking for counsel and support from people who know and care about them. But talking to friends and family and obtaining anecdotal information is not equivalent to receiving in-depth counseling and information from sources qualified by training and experience. She expressed no appreciation that many women experience emotional and psychological problems as a consequence of their decision or why that is so.

With regard to alternatives to abortion, Jane Doe exhibited only the most superficial consideration. Finally, she did not demonstrate that she has considered the impact a decision to have an abortion might have on her relationships with her parents or others or her future relationships.

Because Jane Doe’s proof was deficient, the trial court did not err in denying her application. I agree with the Court, however, that because no court has ever construed section 33.003, this matter should be remanded in the interest of justice.

Accordingly, I join only in parts I, II, and III of the Court's opinion, and I join the judgment.

Priscilla R. Owen
Justice

OPINION DELIVERED: February 25, 2000